OAH Docket No. 4-3100-14123-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Regan Perttu,

Petitioner,

vs.

City of Keewatin,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding at 9:30 a.m. on Monday, March 19, 2001, at the Office of Administrative Hearings, Room 711, 320 West Second Street, Duluth, Minnesota. The record closed on April 20, 2001, when all of the parties' post-hearing briefs were received.

Gunnar B. Johnson, Attorney at Law, of the Clure Eaton Law Firm, Suite 200, 222 West Superior Street, Duluth, Minnesota 55802-1907, appeared at the hearing for the Petitioner, Regan Perttu. Kent E. Nyberg, Attorney at Law, Suite 101, 20 NE Fourth Street, Grand Rapids, Minnesota 55744, appeared at the hearing for the Respondent, City of Keewatin (the City).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing this Report and the hearing record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions of Law, and Recommendations. Under Minnesota Law,[1] the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time, the Commissioner must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument to him. Parties should contact the office of Jeffrey Olson, Commissioner, Minnesota Department of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155-2079, to find out how to file objections or present argument.

STATEMENT OF THE ISSUE

Shortly after being hired by the City as an electrician assistant, Mr. Perttu encountered serious workplace conflicts and potential hazards. The City placed him on a paid leave of absence while attempting to resolve the difficulties. The situation was unresolved when his paid leave expired. Mr. Perttu therefore declined to report for work, and the City stopped paying him. Although Mr. Perttu is a veteran, the City has never given him notice of his rights under the Veterans Preference Act.

1. Did the City discharge Mr. Perttu for unsatisfactory performance?

2. Did Mr. Perttu voluntarily resign his position of electrician assistant for good cause attributable to the City?

3. Did the City place Mr. Perttu on an involuntary, unpaid leave of absence?

4. Is Mr. Perttu entitled to reinstatement and back pay? And if so, what amounts may the City offset against its back pay liability?

SUMMARY

The City did not discharge Mr. Perttu for unsatisfactory performance, and he did not voluntarily resign his position of electrician assistant. In essence, after his paid leave expired, the City placed him on an involuntary, unpaid leave of absence as the parties continued to attempt to resolve his employment status. An involuntary, unpaid leave is a "removal" within the meaning of the Veterans Preference Act, so Mr. Perttu is entitled to reinstatement and back pay. But the City may offset the back pay award by the amount of unemployment compensation benefits that Mr. Perttu has received, since November 12, 2000.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Regan Perttu lives at 18 8th Street N.W., in Chisholm, Minnesota. From May 20, 1971, until April 19, 1975, he served on active duty in the United States Air Force, after which he was honorably discharged.[2]

2. The City of Keewatin is located in St. Louis County, Minnesota, and is a political subdivision of the state. The City has not adopted a civil service system or any rules or regulations governing its personnel practices. Rather, the terms and conditions of employment with the City are set forth in a collective bargaining agreement between the City and and Local 81 of the American Federation of State, County and Municipal Employees (AFSCME).[3]

3. In April 2000 the City posted and advertised the existence of a vacancy in its maintenance unit for a water service maintenance and electrical assistant and invited applications for the position.[4] The duties of the position involved responsibility for:

> . . . the installation and maintenance of electrical utilities, both commercial and residential, as well as installation and maintenance of a potable water supply to the community. The position includes routine, as well as emergency repairs for both water and electric utility systems, including power lines and water services.[5]

4. The City hired Mr. Perttu for the vacant water service and electrical position in mid-July 2000, and he started work on August 1, 2000, with compensation of $12.43 per hour.[6] During the interview process Mr. Perttu indicated that he had prior experience as an electrical apprentice at a mining company, but he had no prior experience in working as an electrical lineman. He requested the City to provide him with appropriate training to enable him to perform duties as an electrical lineman, and the City agreed.[7]

5. Soon after Mr. Perttu reported for work, a conflict developed between him and other members of the City's maintenance unit. During his second week of work other members of the unit refused to provide him with lineman training, and he was directed to work on electrical lines without any prior training or instruction.[8] He was verbally harassed, and on September 5, 2000, another member of the unit physically assaulted him.[9]

6. After the September 5th incident, Mr. Perttu met with City officials to discuss ways of resolving the workplace conflicts that had occurred. On September 20, 2000, he participated in a closed City Council meeting that had been convened to address the workplace conflicts.[10] At that meeting Mr. Perttu read a statement describing the problems that he had been encountering in the workplace.[11] Steve Giorgi, an AFSCME business representative, was present at the meeting; he discussed some options that might be available and offered to prepare a written agreement that would resolve the situation.[12]

7. Mr. Perttu was on probation and not yet a dues-paying member of AFSCME.[13] He did not request Mr. Giorgi to represent him or to intervene in his dispute with the City.[14] Neither Mr. Perttu nor the City agreed to any terms during the September 20, 2000, City Council meeting.[15] Rather, Mr. Giorgi offered to draft an agreement with terms that he believed would be acceptable to both parties and to send the draft agreement to Mr. Perttu and the City for signature.[16] The City Council then passed a resolution placing Mr. Perttu on a paid leave of absence for sixty days beginning on September 18, 2000, until an agreement resolving Mr. Perttu's employment issues could be consummated.[17]

8. Following the September 20, 2000, meeting, Mr. Giorgi drafted a Separation Agreement that provided, among other things, for the City to permanently lay Mr. Perttu off at the end of his sixty-day paid leave of absence.[18] Mr. Giorgi sent

the draft agreement to Mr. Perttu for signature, but Mr. Perttu declined to agree to the terms and sign the Separation Agreement.[19] Since Mr. Perttu declined to sign the agreement, the City also declined to sign it.[20]

9. Mr. Perttu's sixty-day paid leave of absence expired on November 15, 2000.[21] On the following day, the City stopped paying Mr. Perttu compensation and benefits.[22] The City has never expressly directed Mr. Perttu to return to work after his paid leave of absence expired, nor has Mr. Perttu ever offered to return to that position.[23]

10. On November 16, 2000, Mr. Perttu's attorney, Gunnar Johnson, wrote the City indicating a desire to come to an understanding with the City regarding Mr. Perttu's employment status.[24]

11. On November 12, 2000, before his paid leave of absence expired, Mr. Perttu filed a claim for unemployment benefits with the Minnesota Department of Economic Security (DES).[25] In making that claim, Mr. Perttu asserted that he was to be discharged from his employment with the City on November 15, 2000, because his employment did not meet the City's expectations.[26] On November 27, 2000, the City filed a protest to Mr. Perttu's unemployment benefit claim. In its protest, the City alleged that:

> Mr. Perttu is still an employee of the City of Keewatin, he was on a 60 day paid leave which ended on November 15, 2000 and since then has not returned to work. Mr. Perttu has not been terminated or laid off by the City of Keewatin and is still a City of employee as of this date.[27]

12. Notwithstanding the City's protest, on December 15, 2000, the DES adjudicator found that Mr. Perttu had been discharged from his employment with the City on November 15, 2000, "for reasons other than employment misconduct. His performance did not meet their expectation."[28] The adjudicator therefore awarded Mr. Perttu unemployment benefits at the rate of $331 per week for approximately one calendar year, not to exceed $7,426 in the aggregate.[29]

13. Meanwhile, in late November 2000, the City advertised the existence of a vacancy in the position of janitor and invited applications for that position.[30] The duties of janitor involved responsibility for:

> . . . general cleaning and routine maintenance of city hall, library and other buildings. This person is also responsible for reading electric meters and replacing the Utilities Clerk.[31]

As of November 2000, the starting compensation for the janitor position was $9.47 per hour, or $2.96 per hour less than the starting compensation for the water service maintenance and electrician assistant position.[32]

14. On November 27, 2000, Mr. Perttu's attorney wrote to Mayor Koprivec suggesting that one way of resolving Mr. Perttu's employment status and disputes with

the City might be to place him in the vacant janitor position.[33] The attorney indicated that Mr. Perttu would agree to that solution subject to the following conditions:

> . . . [that] the janitor's position was not probationary, that his paid leave of absence is counted as active service, that his pay remain the same, that the janitor's position is a permanent one, and that his involvement with individuals in the City crew and garage crew is kept to an absolute minimum.[34]

15. The City did not agree to the conditions that Mr. Perttu's attorney had placed on his acceptance of the janitor position, and in a meeting on December 5, 2000, the City Council officially took the position that Mr. Perttu had resigned his water service maintenance and electrician assistant position by failing to report for work after his paid leave of absence ended on November 15, 2000.[35] By a December 20, 2000, letter to Mayor Kiprovec, Mr. Perttu's attorney asserted the following position concerning his client's employment status with the City:

> It is out (sic) position that Mr. Perttu is still an employee of the City of Keewatin. He is still entitled to his regular wage. He has not been terminated following the procedure set forth in the Veteran's Preference law.[36]

16. Following the exchange of communications in late December 2000, the parties were unable to make any further progress in resolving Mr. Perttu's employment status with the City. On January 2, 2001, Mr. Perttu filed a Petition for Relief under the Veterans Preference Act, and this contested case proceeding ensued.

17. The janitor position that the City had posted and advertised in late November 2000 was not filled and was re-posted and re-advertised in January 2001 and again in February 2001. That position was still vacant at the time of the hearing in this matter.[37]

18. The water service maintenance and electrician assistant position that Mr. Perttu has held is also currently vacant.[38]

19. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

20. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Findings.

21. The Administrative Law Judge adopts as Findings any Conclusions, which are more appropriately described as Findings.

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law[39] gives the Administrative Law Judge and the Commissioner of the Department of Veterans Affairs authority to conduct this proceeding under the Veterans Preference Act[40] and to make findings, conclusions, and either recommendations or orders, as the case may be.

2. The Department has complied with all of the law's substantive and procedural requirements.

3. Mr. Perttu and the City were given proper and timely notice of the hearing in this matter.

4. Mr. Perttu is an honorably discharged veteran within the meaning of the Veterans Preference Act[41] and is therefore entitled to all of the Act's protections and benefits.

5. The City is a political subdivision of the state within the meaning of the Veterans Preference Act,[42] and its personnel practices are therefore subject to the Act's provisions.

6. The Veterans Preference Act[43] requires that a veteran be given notice of his or her right to a hearing to establish incompetency or misconduct prior to any action by a public employer that removes the veteran from his or her position.

7. The City did not notify Mr. Perttu of his right to a hearing or of any other right under the Veteran's Preference Act prior to the March 19, 2001 hearing in this contested case proceeding.

8. In an administrative contested case proceeding,

> [t]he party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard. A party asserting an affirmative defense shall have the burden of proving the existence of the defense by a preponderance of the evidence.[44]

9. Mr. Perttu had the burden of proving that the City discharged him from his position of electrician assistant for poor performance, but he failed to prove that by a preponderance of the evidence.

10. The City had the burden of proving that Mr. Perttu voluntarily resigned from his position of electrician assistant, but it failed to prove that by a preponderance of the evidence.

11. Mr. Perttu had the burden of proving that his failure to report for work after his paid leave of absence expired on November 15, 2000, was with "good cause

attributable to the employer."[45] Mr. Perttu did prove that by a preponderance of the evidence.

12. The City placed Mr. Perttu on an involuntary leave of absence without pay after his paid leave of absence expired on November 15, 2000. By so doing, the City "removed" him within the meaning of the Veterans Preference Act[46] and therefore violated his rights under that Act.

13. Mr. Perttu is entitled to reinstatement to the position of electrician assistant and to back pay beginning on November 15, 2000, and continuing until the City has met all of the statutory requirements of the Veterans Preference Act.[47]

14. The City is entitled to offset any unemployment compensation benefits that Mr. Perttu has received since November 12, 2000, against the back pay for which it is liable.[48]

15. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

16. The Administrative Law Judge adopts as Conclusions any Findings, which are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge recommends:

(1) That the Commissioner reinstate the Petitioner, Regan Perttu to his former position of water service maintenance and electrician assistant with the City of Keewatin effective November 15, 2000;

(2) That the Commissioner award back pay to Mr. Perttu in the amount of $12,321.60 from November 15, 2000, through May 5, 2001, together with interest thereon at the rate prescribed by law from the time that each paycheck was due;

(3) That the Commissioner allow the City to offset against that back pay award any unemployment compensation benefits that Mr. Perttu has received since November 12, 2000; and

(4) That the Commissioner direct the City to continue paying Mr. Perttu as a water service maintenance and electrician assistant, at the rate prescribed by the applicable collective bargaining agreement, until the City has met all of the statutory requirements of the Veterans Preference Act.

Dated this 7th day of May 2001.

BRUCE H. JOHNSON
Administrative Law Judge

Recorded: 3 tapes – no transcript prepared.

NOTICE

Under Minnesota law,[49] the Commissioner must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

I. Factual Background

This matter arose out of some serious conflicts that occurred within the City's water service and electrical work unit in August and September 2000. Over the last several months the parties have been unable to resolve the problems that those conflicts created for Mr. Perttu, and that inability ultimately led to the initiation of this contested case proceeding.[50] Meanwhile, Mr. Perttu's employment status with the City has been highly ambiguous over the last eight months, with the ambiguities complicated by the shifting and sometimes contradictory positions being taken by both parties from time to time. It is Mr. Perttu's hope that his recourse to the Veterans Preference Act will help resolve some of the ambiguities that surround his employment status and will lead to a resolution of the situation.

Initially, in late September 2000 the parties attempted to resolve their differences by having an AFSCME business agent help them work out a settlement agreement. To allow time for that to occur, the City Council approved a sixty-day paid leave of absence for Mr. Perttu, which expired on November 15, 2000. So there appears to be no dispute over the fact that Mr. Perttu remained a City employee during that period. Unfortunately, the parties were unable to agree on a resolution of their differences during those sixty days, and the leave of absence expired without any clarification of Mr. Perttu's status. Thereafter, Mr. Perttu initially took the position that the City discharged him on November 15, 2000, for failure to meet its performance expectations and applied for unemployment compensation benefits.[51] The City responded by taking the position that Mr. Perttu was never discharged but continued to be a City employee after November 15, 2000.[52]

In late November 2000 a City janitor position became vacant, and the parties explored the possibility of moving Mr. Perttu into that position as a way of resolving their differences. One impediment to that solution was the fact that the janitor position paid $2.96 per hour less than what Mr. Perttu had been earning as an electrician assistant.[53] Ultimately, the parties were unable to arrive at a meeting of the minds about using the janitor position as a vehicle for resolving their differences, although it appears that the City has yet to fill that position. In any event, in early December 2000 the City changed its position on Mr. Perttu's employment status and began asserting that his failure to report for work on or after November 16th amounted to a resignation. The City has continued to assert that position in this proceeding. On the other hand, despite the fact that he had applied for and had been awarded unemployment compensation benefits, Mr. Perttu took the position on December 20, 2000 that he had not been terminated and was still a City employee.[54] But he changed his position again in February 2001 when he filed his Petition for Relief in this matter and stated again that he had been terminated on November 15, 2000, for unsatisfactory performance.[55]

II. Application of the Veterans Preference Act

The ambiguous fact situation and the parties shifting legal positions complicate efforts to arrive at a clear application of the Veterans Preference Act[56] in this matter. But in

analyzing complex personnel transactions, the Minnesota Supreme Court has indicated that reviewing tribunals should "not [be] concerned with the name and appearance of things but with the reality."[57] The Veterans Preference Act provides that,[58]

> [n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, *shall be removed from such position or employment except for incompetency or misconduct shown after a hearing*, upon due notice, upon stated charges, in writing. [Emphasis supplied.]
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

Simply stated, a veteran must be notified of the right to a hearing to establish incompetency or misconduct whenever a public body *removes* the veteran from his or her position unless the public employer is able to establish an allowable affirmative defense.

III. The City Did Not Discharge Mr. Perttu for Unsatisfactory Performance.

A veteran asserting a claim of removal has the burden of establishing by a preponderance of the evidence that a removal occurred.[59] In his Petition for Relief, Mr. Perttu alleged that "[t]he City of Keewatin terminated Perttu on November 15, 2000 for 'poor performance.'"[60] But Mr. Perttu offered no testimony at the hearing that the City had terminated him for that reason, nor did he elicit any testimony to that effect from the five witnesses whom the City called. In fact the only evidence in the record tending to establish that the City terminated Mr. Perttu for poor performance was a written finding by the DES adjudicator who awarded him unemployment compensation benefits on December 12, 2000:

> The applicant was discharged from his employment on 11-15-00 for reasons other than employment misconduct. His performance did not meet their expectations.[61]

But that evidence is incompetent as a matter of law because the legislature has specifically barred the use of findings by unemployment law judges in other proceedings:

> (d) No findings of fact or decision issued by an unemployment law judge or the commissioner may be held conclusive or binding or used as evidence in any separate or subsequent action in any other forum, except

> proceedings provided for under this chapter, regardless of whether the action involves the same or related parties or involves the same facts.[62]

In short, Mr. Perttu failed to establish by a preponderance of the evidence that the City discharged him on November 15, 2000, for poor performance.

IV. Mr. Perttu Did Not Voluntarily Resign His Position with the City.

On November 15, 2000, the City stopped paying Mr. Perttu. Reduction or suspension of a veteran's pay is *prima facie* a "removal" within the meaning of the Veterans Preference Act.[63] But where a veteran voluntarily resigns his or her position, no "removal" occurs, and the Veterans Preference Act does not apply.[64] A public body claiming that reduction or suspension of pay resulted from a voluntary resignation has the burden of proving that a resignation occurred by a preponderance of the evidence.[65] On the other hand, the veteran may still be entitled to a hearing under the Veterans Preference Act if he or she can prove that the resignation was involuntary and resulted from "good cause attributable to the employer" — that is, was improperly forced or induced by the employer.[66] The veteran has the burden of proving that he or she resigned because of good cause attributable to the public employer.[67]

A resignation is simply abandonment of employment by an employee.[68] A public employee resigns when that employee leaves his or her job while intending never to return to it. Proving that a public employee resigned requires establishing an intent to voluntarily relinquish the position and a contemporaneous act of relinquishment.[69] Whether these elements exist in a particular case are questions of fact.[70] The City argues that Mr. Perttu resigned when he failed to report for work as an electrician assistant after his paid leave of absence expired on November 15, 2000. At first appearance, Mr. Perttu's failure to report for work after his leave expired might appear to be an act of relinquishment of his position. One might also regard his contemporaneous application for unemployment compensation benefits as evidence of intent to relinquish his position. On the other hand, in responding to Mr. Perttu's unemployment compensation claim on November 27, 2000, the City flatly denied that his employment had been terminated and indicated that he was still a city employee.[71] But more important, the evidence failed to establish that Mr. Perttu's failure to report to work as an electrician assistant was a *voluntary* relinquishment of his position. To the contrary, Mr. Perttu met his burden of establishing by a preponderance of the evidence that his failure to report to work was with good cause attributable to the City.

In Brula v. St. Louis County,[72] the Court of Appeals held that "a veteran who resigns, voluntarily or involuntarily, without good cause attributable to the employer is not entitled to notice and hearing under the VPA." In the course of that decision, it indicated that it was appropriate to look to the body of Minnesota case law pertaining to reemployment insurance claims to determine whether or not a veteran's resignation is for good cause attributable to the employer.[73] In those reemployment cases, the Court of Appeals has described 'good cause' in the following way:

> "Good cause" is a reason that is "real, not imaginary, substantial not trifling, and reasonable, not whimsical; there must be some compulsion produced by extraneous and necessitous circumstances." [Citation omitted.] The standard for determining good cause is "the standard of reasonableness as applied to the average man or woman, and not to the supersensitive."[74]

Here, the City does not dispute that there were serious problems within Mr. Perttu's work unit. He had been forced to work on high voltage electric lines without adequate training, and he had been verbally harassed by coworkers and even physically assaulted.[75] The only alternative that Mr. Perttu was later offered was employment as a janitor at a significant reduction in pay. So, even if Mr. Perttu's failure to report to work could be characterized as a resignation, he resigned because he was faced with a choice between returning to a hazardous and hostile work environment or accepting a demotion. The ALJ therefore concludes that these facts clearly fall within the Minnesota Court of Appeals' definition of "good cause attributable to the employer," which would require the City to provide him with his veterans preference rights.

V. The City Placed Mr. Perttu on an Involuntary Leave of Absence without Pay and Therefore Demoted Him.

"[W]hether an employer has by its action removed a veteran is a matter of substance and not of form."[76] As indicated above, the facts of this case do not unequivocally establish a voluntary resignation. For example, at various times in November and December 2000, both parties were still treating Mr. Perttu as a City employee as they struggled to find various solutions to the workplace problems. The City continued to negotiate with Mr. Perttu as if he was an employee on leave of absence well into December. And in mid-December Mr. Perttu himself rejected the notion that his employment had ever been terminated, even though he had not actually worked or been paid since November 15th. On the other hand, the City never expressly directed him to return to work as an electrician assistant, and the evidence suggests that the conflicts within the work unit remained and that the City was unable to resolve those issues. In short, the way in which the parties were dealing with each other leads the ALJ to conclude that after November 15, 2000, Mr. Perttu's status was that of a City employee involuntarily placed on an unpaid leave of absence while the parties continued to attempt to resolve their differences.[77] And placing a veteran involuntarily on an indefinite, unpaid leave of absence amounts to a "removal" for purposes of the Veterans Preference Act, which obliges the public employer to provide the veteran with the rights specified by the Act.[78] Put another way, whether one characterizes what occurred as an involuntary resignation or as placement on an involuntary unpaid leave of absence, the result is the same. The City violated Mr. Perttu's veterans preference rights by stopping his pay without giving him notice of his right to a hearing on whether his paid status was being terminated because of incompetency or misconduct.

VI. Mr. Perttu Is Entitled to Back Pay Offset by the Unemployment Compensation Benefits That He Has Received.

The inquiry here does not end with the conclusion that the City violated Mr. Perttu's veterans preference rights. There remains the question of what should be done about it. Mr. Perttu has requested reinstatement to the position of electrician assistant, along with back pay to November 15, 2000. A veteran who is involuntarily removed from his position by a public employer without first receiving the written notice and hearing required by the Veterans Preference Act is entitled to reinstatement and back pay until his employment is formally terminated in accordance with the Veterans Preference Act.[79] It is therefore appropriate for the ALJ to recommend to the Commissioner that he order reinstatement and back pay here.[80]

At the hearing the parties agreed that the back pay calculations contained in Exhibit 11 were correct for the period November 15, 2000, through March 31, 2001.[81] That amounted to $9,517.60. An additional five weeks have passed. At the rate of $14.02 per hour, Mr. Perttu would be entitled to an additional $2,804 through May 5, 2001, for a total of $12,321.60. Mr. Perttu will also be entitled to additional back pay from March 5, 2001, "until he has been formally discharged as provided in the statute."[82] Moreover, Minnesota's appellate courts have held that a veteran who is entitled to back pay is also entitled to receive interest at the rate of six percent per annum calculated from the time each back paycheck was due.[83]

On the other hand, Minnesota's appellate courts have also held that a veteran's back pay award is subject to damage mitigation measures usually applied to breach of employment contracts:[84]

> A veteran is required to "reduce his claim for wages by the amount which, by the exercise of due diligence, he could have earned in employment of a like kind or grade."[85]

Here, the evidence also established that Mr. Perttu was awarded $331.00 in weekly unemployment compensation benefits beginning on November 12, 2000, and continuing until November 10, 2001, not to exceed $7,426.00 in the aggregate.[86] That was clearly replacement income for his earnings from the City, and his back pay award should be mitigated by the amount of those benefits. Approximately twenty-three weeks have elapsed since that award began. At the rate of $331.00 per week, Mr. Perttu would have reached the maximum award on or about Wednesday, May 2, 2001. So the sum of $7,426.00 (or the amount of unemployment compensation benefits that Mr. Perttu has actually received) should be deducted from his final back pay award.

Finally, Mr. Perttu is claiming $1,500.00 in costs and attorneys' fees.[87] Neither the ALJ nor the Commissioner possesses either general or equitable jurisdiction, such as that possessed by the courts. Accordingly, the Commissioner's power to impose remedies is strictly limited to what the legislature has enacted in statute, subject, of course, to court interpretation. The ALJ is aware of no authority for the Commissioner to award attorneys' fee to a veteran whose veterans preference rights have been violated and, therefore, recommends that the request for attorneys' fees be denied.

VII. Conclusion.

The underlying facts have created difficult situations for both parties. The evidence indicates that Mr. Perttu bore little, if any, responsibility for the serious workplace conflicts that he encountered. On the other hand, it has clearly been difficult for the City to control and resolve those conflicts, particularly since it has very few employees. Both parties have attempted in good faith to arrive at a negotiated solution but have yet been unable to do so. But in a factual setting like this, it is the legislature's clear intent that that the public employer, and not the veteran, bear any economic burdens that may arise while the parties continue to attempt to resolve their differences.

B. H. J.

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[1] Minn. Stat. § 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

[2] Form DD-214 attached to Mr. Perttu's Petition for Relief.

[3] Exhibit 2; testimony of Audrey Svigel.

[4] Testimony of Regan Perttu.

[5] Exhibit A at p. 1.

[6] Exhibit 9.

[7] Testimony of Regan Perttu; Exhibit H.

[8] Exhibit H.

[9] *Id*.

[10] Testimony of Regan Perttu and Steve Giorgi; Exhibits 4 and G.

[11] Exhibit H.

[12] Testimony of Steve Giorgi; Exhibits 4, C and G.

[13] Testimony of Steve Giorgi.

[14] Testimony of Regan Perttu and Steve Giorgi

[15] Testimony of Regan Perttu and Marc Koprivec.

[16] *Id*. Testimony of Steve Giorgi.

[17] Exhibit 4.

[18] Exhibit C.

[19] Testimony of Regan Perttu.

[20] Testimony of Marc Koprivec.

[21] *Id*.; testimony or Regan Perttu.

[22] Testimony of Marc Koprivec.

[23] *Id*.; testimony of Regan Perttu.

[24] Exhibit 12.

[25] Exhibit 6.

[26] *Id*.

[27] Exhibits 5 and E.

[28] Exhibit 6.

[29] Exhibit 5.

[30] Testimony of Regan Perttu.

[31] Exhibit F at p. 1.

[32] Exhibit 9.

[33] Exhibit 13.

[34] *Id*.

[35] Testimony of Marc Kiprovec; *see also* Exhibit 8.

[36] Exhibit 8.

[37] Testimony of Marc Kiprovec.

[38] City's post-hearing submission dated April 19, 2001.

[39] Minn. Stat. § 14.50 and § 197.481.

[40] Minn. Stat. § 197.46.

[41] Minn. Stat. § 197.447 and § 197.46.

[42] Minn. Stat. § 197.46.

[43] *Id*.

[44] Minn. R. pt. 1400.7300, subp. 5.

[45] *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999).

[46] Minn. Stat. § 197.46. *See Myers v. City of Oakdale*, 409 N.W.2d 848 (Minn. 1987).

[47] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn.App. 1987).

[48] *Id*.

[49] Minn. Stat. § 14.62, subd. 1.

[50] Evidence introduced by the City establishes that members of Mr. Perttu's work unit refused to provide him with the training necessary to enable him to work safely on high voltage power lines, that they forced him to work on those power lines without adequate training, that they harassed him on the job, and on one occasion physically assaulted him. (Exhibits G and H)

[51] Exhibits 5 and 6.

[52] Exhibits 6 and e.

[53] Finding of Fact Nos. 13 through 15.

[54] Exhibit 14.

[55] The ALJ notes that apart from the assertions in the Petition for Relief and in Mr. Perttu's application for unemployment compensation benefits, there is absolutely no evidence in the record that the City ever considered his performance as an electrician assistant to have been unsatisfactory.

[56] Minn. Stat. §§ 197.447 *et seq*.

[57] *Downing v. Independent School Dist. No. 9, Itasca County*, 291 N.W. 613, 618 (Minn. 1940) (involving interpretation of a teacher contract); *cf*. *State ex rel. Niemi v. Thomas*, 27 N.W.2d 155, 158 (Minn. 1947) and *Young v. City of Duluth*, 386 N.W.2d 732, 737-38 (Minn. 1986) (both considering whether veterans' positions were abolished in good faith).

[58] Minn. Stat. § 197.46.

[59] Minn. R. pt. 1400.7300, subp. 5.

[60] Petition for Relief at p. 1.

[61] Exhibit 6.

[62] Minn. Stat. § 268.105, subd. 5(d).

[63] Leininger v. City of Bloomington, 299 N.W.2d 723 (Minn. 1980); *Myers v. City of Oakdale*, *supra*.

[64] *Brula v. St. Louis County*, 587 N.W.2d 859 (Minn.App. 1999).

[65] Minn. R. pt. 1400.7300, subp. 5.

[66] *Id*. at 861.

[67] *Id*.; *cf*. *Shanahan v. District Memorial Hospital*, 495 N.W.2d 894, 897 (Minn. App. 1993).

[68] *Erickson v. Sorby*, 96 N.W. 791 (Minn. 1903).

[69] *State ex rel. Young v. Ladeen*, 116 N.W. 486, 487 (Minn. 1908); *Byrne v. City of St. Paul*, 163 N.W. 162, 163 (Minn. 1917); *Hosford v. Board of Education of the City of Minneapolis*, 275 N.W. 81, 82 (Minn. 1937).

[70] *Id*.

[71] Exhibit E.

[72] *Supra*, 587 N.W.2d at 862.

[73] *Id*. at 861.

[74] *Haskins v. Choice Auto Rental, Inc.*, 558 N.W.2d 507, 511 (Minn. App. 1997).

[75] The City itself introduced evidence of all this in Exhibit G and H and never denied that any of it occurred.

[76] *Myers v. City of Oakdale*, *supra*, 409 N.W.2d at 850.

[77] There was no evidence tending to establish that Mr. Perttu agreed not to be paid after November 15, 2000.

[78] *See Myers v. City of Oakdale*, *supra*.

[79] *Henry v. Metropolitan Waste Control Commission*, *supra*.

[80] *Bolden v. Hennepin County Board of Commissioners*, 504 N.W.2d 276, 277-78 (Minn. App. 1993).

[81] The City merely agreed with the pay rates and arithmetic. It did not concede that it had any liability for back pay.

[82] *Henry v. Metropolitan Waste Commission*, *supra*, 401 N.W.2d at 405.

[83] *Id.* at 406.

[84] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn. App. 1987).

[85] *Id*., quoting *Spurck v. Civil Service Board*, 42 N.W.2d 720, 727 (Minn. 1950).

[86] Exhibit 5.

[87] Exhibit 11.